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IN THE

Supreme Court of the United States

October Term, 1959.

No. 439

JOHN MIHALCHAK,

Petitioner,

v.

AMERICAN DREDGING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania was rendered by an order dated October 14, 1958 (App. 32a-33a). The opinion of the Court of Appeals for the Third Circuit is recorded in F. 2d (*infra*, p. 17). The denial of the petition for rehearing was rendered on July 2, 1959 and is reported in F. 2d (*infra*, p. 24).

JURISDICTION.

The judgment of the Court of Appeals was entered on May 12, 1959 (*infra*, p. 23). The order denying rehearing was entered on July 2, 1959 (*infra*, p. 24). The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where the testimony of a plaintiff and his witness is neither impeached nor controverted by the defendant, and where there are no circumstances tending to cast suspicion upon such testimony, and where the evidence to be controverted relates to matters which are peculiarly within the knowledge of the opposing party and capable of contradiction if untrue, and where the defendant under these circumstances chooses not to present any evidence whatsoever, should not the trial judge direct a verdict for the plaintiff, where such uncontradicted facts spell out liability as a matter of law?

2. Is not the shipowner liable under the warranty of seaworthiness and also upon theories of negligence because of its non-delegable duty when an appurtenance of the vessel is either inherently dangerous or made so by the negligent conduct of the shipowner's representatives?

STATEMENT OF THE CASE.

Defendant offered no evidence as to liability at the end of plaintiff's case and the case was thus submitted to the jury on the uncontradicted evidence of the plaintiff. The undisputed evidence disclosed as follows: Petitioner, John Mihalchak, was a deckhand on respondent's vessel, which was engaged in a dredging operation in the Delaware River. After mud was scooped out of the river bed and deposited in a scow, Mihalchak accompanied the scow as it was towed to a dumping ground about ten miles down-river, and he was assigned the job of opening the doors on the underside of the scow and dumping the mud.

The mechanical arrangement for controlling the bottom door of each compartment in the scow consisted of two chains attached to the end of the door. Each chain was carried up from the bottom of the door to a block on the deck of the scow and was then connected to a shaft running the length of the scow. By rotating the shaft so as to take in the chain, the doors would be closed. To prevent the chain from slipping and the door from opening, a metal bar called a "dog" was slid in between the teeth of the gear which was mounted on the shaft. When the dog was removed from the teeth of the gear, the shaft would rotate freely, permitting the chain to run out and the dead weight of the mud upon the doors would cause them to open and the scow to empty.

However, because of the tremendous weight on these doors a great stress was imposed on the chain holding the doors and the dog as set in the gears, which was in fact a chain stopper. Therefore, in order to release the chain and allow the doors to open, a sledge hammer had to be used to knock the dog out of the teeth of the gears. As a result, the teeth of the gears became chipped, deteriorated and so worn that on some occasions it became necessary to secure the dog in place by inserting a stone or a block

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

JOHN MIHALCHAK,

Petitoner,

v.

AMERICAN DREDGING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John Mihalchak, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on May 12, 1959, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 12,794, and the order of the said court denying rehearing entered on July 2, 1959.

of wood (Appendix 24a-25a) in order to keep it from sliding out of the worn gear and thereby releasing the chain and doors. Mihalchak had nothing to do with the closing of the doors or securing the dog in the gears. His job was to accompany the scow and dump the load.

During the night of May 22, 1956, the scow (Scow 116) had been navigating down the Delaware River to the dumping grounds, and Mihalchak then proceeded with the operation of opening the doors in the underbelly of the scow. As he was clearing the muck which had clogged the area alongside the dog, so that he could strike the dog with the sledge hammer and drive it out of the teeth of the gears, the dog suddenly slipped out of the gear before he had finished clearing the area, thereby releasing the chain and causing the gear to spin around with tremendous speed. As a result, plaintiff's right hand and wrist were caught and struck repeatedly by the crushing blows of the protruding dog.

Mihalchak testified in his own behalf regarding the facts of the accident, and he called the witness Ewanichak, who testified as to the condition of the equipment and the prior occurrences. Respondent failed to introduce any evidence to contradict either witness, although numerous other persons were available who could testify as to the condition of the gear and the prior occurrences and there were other persons available in the area where the accident occurred, including the officers, who could have testified regarding the accident itself.

The cause was tried below on two theories of liability: (1) that the vessel was unseaworthy in that the dog and gear assembly which caused the accident was worn to such a degree as to make it dangerous and inadequate for the purpose for which it was intended; and (2) that the vessel had failed to provide plaintiff with a safe place to work.

In sum, the undisputed testimony of the plaintiff and the witness, Ewanichak, who admittedly has no interest in the litigation, was that the purpose for which the dog

was intended was to hold the gear; that the dog and gear assembly was worn and chipped; that while being employed for the purpose for which it was intended, and without any external assistance the dog slipped out of place causing serious injury to the plaintiff. This testimony was reasonable on its face and in accordance with probability. It was wholly unchallenged by other evidence or circumstances, and it was completely corroborated by the undisputed facts. There was no lack of candor on the part of Mihalchak or the witness Ewanichak, and their testimony was neither shaken by cross-examination nor was its accuracy inferentially or directly controverted by proof of other circumstances. In view of the failure of the American Dredging Company to offer any evidence in contradiction to the above stated facts even though it was in a position to proffer such evidence were it existent, Mihalchak, at the close of the case, moved for a directed verdict. The trial judge refused this motion and submitted the case to the jury. The jury rendered a verdict in favor of the defendant. Plaintiff thereupon moved for judgment notwithstanding the verdict and for new trial, both of which motions were denied by the trial court.

The trial court, in denying the post-trial motions, conceded that the defendant had introduced no contradictory evidence; and that the testimony of Mihalchak and Ewanichak withstood the cross-examination of defendant's counsel. However, the court believed that certain photographs of the dog and gear assembly, which were introduced by Mihalchak for the sole purpose of showing the jury what the assembly looked like, afforded the jury a basis upon which to infer that the gear was seaworthy, and this even though the photographs fully corroborated the testimony of the plaintiff. For, although most of the teeth of the gear were hidden, the photographs showed the dog to be worn and the teeth which were exposed to be chewed and worn.

The Court of Appeals affirmed the trial judge, but upon different grounds. The Court of Appeals reasoned that while it was true that the evidence supported a finding that the respondent was negligent and the vessel was unseaworthy; nevertheless, that court held further that other inferences were also deducible from the evidence which could support a finding for the defendant, namely: (a) the credibility of Mihalchak and the witness required the submission of the case to the jury; (b) that the gear may have slipped because it was improperly set in the first instance before the scow was loaded; and (c) that the accident may have happened because of some undisclosed action by Mihalchak. There is no evidence in the record which suggests, expressly or inferentially, that the accident happened because of some action on the part of Mihalchak. In fact, the evidence in the record refutes any suggestion that the accident did or could have happened in any manner other than that related by Mihalchak.

This reasoning of the Court of Appeals conflicts with the general principles laid down by this court and as adopted by other Courts of Appeals.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First Point: The Decision of the Court Below Violates the Rule That When the Testimony of a Plaintiff and His Witness Is Neither Impeached Nor Controverted by the Defendant, the Trial Judge Should Grant a Judgment Notwithstanding the Verdict.

The authority is uniform to the effect that when the testimony of witnesses, interested in the event or otherwise, is clear and convincing, not incredible in the light of general knowledge and common experience, not extraordinary, not contradicted in any way by witnesses or circumstances, then a question has been presented for the court's determination and not for the jury. See *Chesapeake & Ohio R. Co.*, 283 U. S. 209 (1931); *Pa. R. R. Co. v. Chamberlain*, 288 U. S. 333 (1933); *Dietz v. Greyhound Corp.*, 234 F. 2d 327 (5 Cir., 1956); *Sprague v. The Texas Company*, 250 F. 2d 123 (2 Cir., 1957); *Nicholas v. Davis*, 204 F. 2d 200 (10 Cir., 1953); *Gibson v. Southern Pacific Co.*, 67 F. 2d 758 (5 Cir., 1933); *Arnall Mills v. Smallwood*, 68 F. 2d 57 (CA 5, 1933); *Alabama Title & Trust Co. v. Millsap*, 71 F. 2d 518, 520 (5 Cir., 1934); *San Francisco Assn. for the Blind v. Industrial Aid*, 152 F. 2d 532 (8 Cir., 1946); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F. 2d 893 (8 Cir., 1946); *Greenfield v. C. I. R.*, 165 F. 2d 318 (4 Cir., 1947); *Stone v. Stone*, 136 F. 2d 760 (D. C. Cir., 1943); *Herbert v. Riddell*, 103 F. Supp. 369 (S. D. Cal., 1952); 9 Wigmore Evidence 306 (3rd ed., 1940) and cases cited therein.

That the testimony is elicited from interested witnesses in no way detracts from the applicability of the well-settled principles set forth above. Thus, in *Chesapeake and Ohio R. Co. v. Martin*, 283 U. S. 209 (1931), this specific question was presented to this court, and this court in reversing the lower court stated (pp. 216-7):

"We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. *Its accuracy was not controverted by proof or circumstances, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so.* The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held.

"It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generalizations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them. In many, if not most, of them, there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested." (Emphasis added.)

See also *Nicholas v. Davis*, 204 F. 2d 200, 202 (10 Cir., 1952); *San Francisco Assn. for the Blind v. Industrial Aid for the Blind*, 152 F. 2d 532 (8 Cir., 1946); *In Re Collins*, 141 F. Supp. 25 (S. D. Cal., 1956); *Winer v. Commissioner of Internal Revenue*, 242 F. 2d 938, 944 (9 Cir., 1957); *Herbert v. Riddell*, 103 F. Supp. 369 (Cal., 1952); 9 Wigmore, Evidence, Section 2495 and cases cited therein.

The sound view as adopted by the majority of the courts, therefore, is that the mere fact of interest in a controversy in and of itself, and apart from some other circumstances appearing in the case, does not render it reasonable to disbelieve the testimony of a witness who otherwise it would be unreasonable to disbelieve. Thus, where controlling, positive and uncontradicted evidence is introduced and is unimpeached by cross-examination or otherwise, it may not be capriciously disregarded, even though adduced from interested witnesses. In such case, no question of fact is presented for the jury's determination.

In addition, it must be recognized that the rule that uncontradicted testimony may not be disregarded if it is not inherently improbable or deficient is especially applicable in those cases where the evidence to be controverted relates to matters which are peculiarly within the knowledge of the opposing party and not capable of contradiction as untrue. See *Miller v. Lykes Bros.-Ripley S. S. Co.*, 98 F. 2d 185, 186; *Yates v. Dann*, 11 F. R. D. 386, 391 (footnote 34), aff'd in part 223 F. 2d 64; *Alaska S. S. Co. v. Petterson*, 205 F. 2d 487 (9 Cir., 1953), aff'd per cur. 347 U. S. 396 (1954).

Thus, in the recent case of *Sprague v. Texas Co.*, 250 F. 2d 123 (2 Cir., 1957), a crew member was injured when hot water and steam unexpectedly escaped from the water heater in the engine room while he and others were removing the head of the heater. The plaintiff's evidence was uncontradicted by the defendant, whereupon the plaintiff moved for a directed verdict. The trial judge granted

plaintiff's motion and the question of damages alone was submitted to the jury. In a per curiam opinion affirming the action of the lower court, the Court of Appeals for the Second Circuit stated, "More than ample uncontradicted evidence of seaworthiness supports the trial court's ruling on the motion." After reciting the circumstances of the occurrence, the court found that, "The conclusion is inescapable that the valves of the gauge were not in proper working condition." It was the failure of the defendant shipowner to offer any evidence in contradiction of the plaintiff's evidence that the equipment failed to operate as it should that warranted the trial judge in the direction of a verdict for the plaintiff. The affirming opinion concluded with the statement, "Because of the undisputed evidence on the subject of unseaworthiness the direction of a verdict in plaintiff's favor was proper and the judgment is affirmed."

In the case at bar, both the vessel and the equipment involved were in the possession of the respondent, American Dredging Company. Respondent had all the time it desired following the accident to inspect the mechanism in question for the purpose of determining its seaworthiness, and certainly would have produced the testimony of witnesses that the assembly in question was not defective or inadequate. At any rate, such an inference is properly drawn. Defendant, however, chose not to present any evidence whatsoever in relation to the condition of the equipment on Scow 116. If the subject matter of the testimony adduced by plaintiff concerning matters within the control of the defendant, so that its truth or falsity could not have been without the defendant's knowledge, the apparent admission indicated by defendant's silence in the face of such testimony is difficult to gainsay. It makes little sense in such a situation to say that the jury may reject plaintiff's evidence, when the defendant itself made no attempt to discourage a finding of unseaworthiness while the means to do so were necessarily available to it.

Point Two: The Decision of the Court Below Violates the Rule Laid Down by This Court in Crumady v. Joachim Hendrik Fisser, 358 U. S. 423; Rogers v. U. S. Lines, 347 U. S. 984; Alaska S. S. Co. v. Petterson, 347 U. S. 396; and Is in Direct Conflict With the Decisions of the Court of Appeals for the Second Circuit in Grillea v. U. S., 232 F. 2d 919 (1956); and Poignant v. U. S., 225 F. 2d 595, All of Which Hold to the Basic Maritime Principle That a Shipowner Is Liable When an Appurtenance of the Vessel Which May Not Have Been Inherently Defective Is So Adjusted as to Make It Unsafe and Dangerous.

In support of its affirmance of the district court, the Court of Appeals reasoned that in addition to the inference that the dog and gear assembly was defective, the evidence could also support the inference that the dog slipped from the gear, not necessarily because the teeth and gear were chipped and the dog worn but because the dog was improperly secured within the teeth of the gear. The shipowner's obligation to supply a seaworthy vessel and safe and seaworthy appliances is absolute and nondelegable. *Seas Shipping Company v. Sieracki*, 328 U. S. 85; *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; *Sutherland v. Buckeye Cotton Oil Co.*, 259 F. 909. It is likewise continuing in character. As this court pointed out in the *Mahnich* case, *supra*, at page 104, quoting from *The Osceola*, 189 U. S. 158, 175, the shipowner's obligation is to "supply and *keep in order* the proper appliances appurtenant to the ship" (emphasis in the original). See also *Pacific American Fisheries v. Hoof*, 291 F. 306, cert. den. 263 U. S. 712; *The Dredge No. 15*, 264 F. 135.

In *Crumady v. Joachim Hendrik Fisser*, 358 U. S. 423, this court held that a seaworthy appliance can be rendered unseaworthy by an adjustment that makes it unsafe and dangerous for the work at hand. In this regard, the court stated at page 417:

> "The winch—an appurtenance of the vessel—was not inherently defective, as was the rope in the Mahnich case. But it was adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work at hand. . . In this case the winch makes the vessel pro tanto unseaworthy."

In *Grillea v. U. S.*, 232 F. 2d 919 (2 Cir., 1958), the libellant, a longshoreman, sued for personal injuries sustained when he fell through an open hatch while working on board a vessel owned by the respondent. The claim was based upon the theory that the vessel which was originally seaworthy became unseaworthy when the wrong hatch cover (one without the necessary indentation) was placed over the padeye; and that, therefore, libellant could recover for the injury sustained when he stepped upon the hatch cover and it gave way beneath him. In that case, although there was no question but that the gear was originally seaworthy, Judge Learned Hand allowed recovery on the basis that as soon as the wrong hatch cover was placed over the padeye the ship became pro tanto unseaworthy and stated (p. 922-923):

> "The claim is based upon the theory that, as soon as the wrong hatch cover was placed over the 'padeye' the ship became pro tanto unseaworthy, and that, when the libellant stepped upon it and it gave way beneath him, he came within the decision of the Supreme Court in Seas Shipping Company v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, which extended the doctrine of The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760, to longshoremen, while loading or discharging a ship. The respondents answer that a ship's seaworthiness has from time immemorial been measured by her fitness for the service in hull, gear and stowage, that in all these respects the ship at bar was well provided, and that the libellant's injuries were due solely to the negligence of himself or his

companion, Di Donna, or both, in selecting the wrong hatch cover to place over the 'padeye'.

* * *

". . . In the case at bar although the libellant and his companion, DiDonna, had been those who laid the wrong hatch cover over the 'pad-eye' only a short time before he fell, we think that enough time had elapsed to result in unseaworthiness. The cover was one of two or three that they had already put in place on the after section of the hatch; *it had become part of the platform across which the two walked to gain access to the middle section on which they were going to place another cover. The misplaced cover had become as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.*"

This line of reasoning was also employed by Chief Judge Biggs in his dissenting opinion in *Crumady v. Fisser*, 249 F. 2d 818, cert. granted, 357 U. S. 903, and reversed, 358 U. S. 423, where, citing *Grillea* and making a "logical and necessary extension of the principles enunciated in Seas Shipping Company v. Sieracki, 328 U. S. 85, and Petterson v. Alaska S. S. Co., 205 F. 2d 478, affirmed 347 U. S. 396", he stated at pages 821-822:

"This is a doctrine to the effect that a seaworthy round peg placed in a seaworthy square hole will render the whole unseaworthy."

Therefore, even if it be assumed that the dog and gear were not defective, despite the fact that there is no evidence to support such assumption in the case at bar, but that the mechanism was rendered dangerous by the way it was secured or adjusted, there can be no question but that the vessel was made unseaworthy when, as in *Crumady*, an appurtenance of the vessel which was not inherently dangerous was made so by the way it was adjusted. See:

Rogers v. U. S. Lines, supra; Alaska S. S. Co. v. Petterson, supra; DiSalvo v. Cunard S. S. Co., 171 F. Supp. 813 (S. D. N. Y. 1959); Cf. *Poignant v. U. S., supra.*

In this regard, the court also reasons that the evidence could possibly give rise to the inference that the dog involved in the accident had not been wedged at all, and that the failure was the proximate cause of the injury. It should be noted that this equipment was not designed so as to require a wedge to hold it in place and that the necessity for the wedge arose out of the fact that the equipment was defective. Therefore, to draw the inference that the accident occurred because the dog had not been wedged, of necessity, would require the finding that the dog and gear assembly was unseaworthy.

In addition, if this is a finding that there never was a wedge upon the vessel and that the failure to have a wedge available was responsible for the dog slipping, and was the proximate cause of the accident, this would merely be unseaworthiness compounded. If, on the other hand, the inference were drawn on the basis that the wedge was required to make the assembly reasonably safe, and that such wedge was available but that those responsible for the loading of the vessel did not properly wedge the dog or did not wedge it at all, then the ship would be charged not only with the unseaworthiness of the gear and dog assembly, but also with the actionable negligence of its employees under the Jones Act. In this regard it should be noted that Mihalchak was not in any way responsible for the loading of the vessel, nor was he responsible for the wedging of the dog and gear assembly. It may be pointed out parenthetically that even if Mihalchak had participated in the original setting of the dog, this would not bar recovery but would only diminish it. See, *Grillea v. U. S., supra.* Therefore, it must be concluded that were we to accept the inference drawn by the court below that the dog and gear assembly itself was not defective, but was

merely made so by the manner in which it was secured, we must still conclude that the vessel was unseaworthy.

Thus, it is clear that a judgment notwithstanding the verdict is required in this case whether on the basis of the facts advanced on behalf of the plaintiff or the inferences which the Court of Appeals attempted to cull from the record. The salient factor is that the shipowner is liable (a) for unseaworthiness, no matter how the unseaworthy condition was created; and (b) for the negligence of anyone who may have improperly or inadequately secured the assembly, because of the ship's non-delegable duty to provide a safe place to work and the doctrine of respondeat superior. This court reaffirmed these principles in *Crumady v. Joachim Hendrik Fisser, supra*, its most recent decision. That doctrine alone when applied to the case at bar calls for a reversal of the judgment and the entry of a judgment notwithstanding the verdict.

CONCLUSION.

The decision of the Court of Appeals below places an interpretation upon the two principles of law never intended by this court. The issues are of substantial national importance and are frequently presented in virtually all of the circuits. If the decision below is allowed to stand, it will have an injurious effect on the uniform application of the law as announced by this court.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
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MARVIN I. BARISH,
Counsel for Petitioner.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,794

JOHN MIHALCHAK,
Appellant,

v.

AMERICAN DREDGING COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 20, 1959

Before McLAUGHLIN and HASTIE, *Circuit Judges* and MORRILL, *District Judge.*

OPINION OF THE COURT.

(Filed May 12, 1959)

By McLAUGHLIN, *Circuit Judge.*

John Mihalchak was employed as a deckhand by American Dredging Company on one of its scows. The scow was engaged in carrying material dredged from the Delaware River downstream to the assigned dumping places. The scow was moved to and fro between the dredge and dumping grounds by a tug. It was one of Mihalchak's duties on signal from the tug captain to open the doors forming the bottoms of the scow's five or six transverse compartments, thereby dumping the mud.

The mechanical arrangement for controlling the bottom-door of each compartment consisted of two chains attached to the end of the door, one forward and one aft. Each chain was carried up from the bottom of the well to a block fastened to the top of the bulkhead which formed the separation between that compartment and the next. The block furnished a fairlead for the chain which was carried thence outboard to the edge of the compartment. Here it was wrapped around and fastened to a shaft extending for and aft along one side of the scow, parallel to and mounted on the deck. By rotating the shaft so as to take in the chains, the door was closed. It was held closed by horizontally pivoting a dog, consisting of an appropriately shaped heavy steel bar extending upward at an acute angle from its mounting on the deck, sideways into and between two of the teeth of a gear concentrically mounted on the shaft. To open the doors it was necessary to knock the dog free from between the teeth with blows from a sledge hammer. The shaft then rotated freely, permitting the chain to run out while the weight piled on the doors opened them.

On the night of May 22, 1956 at about 11:00 P. M. a tug with Mihalchak's loaded scow in tow approached the dumping area. Mihalchak crossed from the tug to the scow where he knocked out the dog securing the door on the first compartment. He moved on to the second compartment and while he was cleaning away the mud and gravel in the vicinity of the dog and gear, in some way the dog was released. Apparently his hand was in the restricted space normally occupied by the dog when it was free. Consequently his hand was caught between the bulkhead and the dog, tending to force the dog back against the rapidly rotating gear which would promptly smash it back again against his hand; consequently the hand was badly injured.

Plaintiff appeals from the denial of his motion for a directed verdict at the close of evidence and its renewal

after the jury verdict in favor of defendant, and from the refusal by the trial court to set aside the verdict and to order a new trial.[1]

This action was brought at law under the Jones Act, 41 Stat. 1007 (1920), as amended, 46 U.S.C. § 688 (1952). At trial plaintiff sought to make his case for recovery under common-law negligence as modified by the Jones Act and on establishing the dog and gear arrangement as unseaworthy. From the form of the pleadings he had, on both of these issues, the risk of non persuasion—the persuasion burden—and the accompanying initial risk of non-production of evidence or the production burden.[2] The question raised by plaintiff's motion for a directed verdict, then, is whether he had so well succeeded in carrying his burden of producing evidence that he was entitled to a veriet in his favor as a matter of law.

The propriety of directing a verdict in appropriate situations in favor of the party imposed initially with the risk of non-production of evidence seems to be well settled.[3] Yet though a motion for directed verdict in favor of the proponent of an issue is cast in the same form as when made by the defending party, it requires the judge to test the body of evidence not for its insufficiency to support a finding, but rather for its overwhelming effect. He must be able to say not only that there is sufficient evidence to support the finding, even though other evidence could support as well a contrary finding, but additionally that there is insufficient evidence for permitting any different finding. The ultimate conclusion that there is no genuine issue of fact[4] depends not on a failure to prove at least enough so

1 See Rule 50, Fed. Rules Civ. Proc.

2 9 Wigmore, Evidence §§ 2485, 2487 (3d ed. 1940). See also McNaughton, Burden of Production of Evidence, 68 Harv. L.R. 1382 (1955).

3 See e.g., 53 Am. Jur., Trials §§ 385, 386; 9 Wigmore, Evidence § 2495 (3d ed. 1940); 5 Moore's Federal Practice, ¶ 50.02(1).

4 6 Moore's Federal Practice, ¶ 59.04(5).

that the controverted fact can be inferred, but rather depends on making impossible any other equally strong inferences once the fact in issue is at least inferable.

In this case it is undoubted that there was evidence which would have been sufficient to support a finding that the plaintiff's injury was caused by the defendant's negligence or by the unseaworthiness of the scow's fittings or by both negligence and unseaworthiness. The question becomes then whether there was any evidence to support contrary inferences. There was evidence that the teeth of the gear and the side of the dog which fitted first between the teeth were chipped. From this it could be inferred that it would be possible for the dog to slip out of the gear and that it was hence not seaworthy.[5] There was in fact testimony of instances on some of the other scows operated by the same company where similarly chipped teeth and dogs had actually slipped, but even as to that testimony the possibility was not foreclosed that the release of those gears was occasioned by original improper securing of the dog. Nor was that testimony explicit as to whether the slipping had occurred when the doors were first being closed or during the loading of the scow or while it was traveling to the dumping ground. It could be inferred that once the door had been held closed during the loading, when it would have been imposed with shocks and strains from material being deposited in the scow, and during a trip while loaded, it would not suddenly open of its own accord.[6]

There was testimony also that the dogs were sometimes wedged into place with pieces of wood or stone; inferably such fastening could prevent release of a gear into which, for some reason, the dog had not been fully inserted or from which the dog might slip. But there was

5 For a discussion of the meaning of "seaworthiness" in personal injury cases see Mesle v. Kea S.S. Corp., 260 F.2d 747, 750 (3 Cir. 1958).

6 For annotations on disregarding evidence which is contrary to laws or nature or physical facts see 8 A.L.R. 796 and 21 A.L.R. 141.

no testimony that the dog involved in the accident had been wedged at all. The plaintiff did speak of clearing out wood as well as mud and stone, but there was nothing to indicate that either stone or wood was wedging the dog in closed position. Nor was there any evidence to indicate that after the occurrence of the accident the scow was operated with the use of a wedge against the dog. From all this is could not be inferred that the only possible explanation for the accident was that the chipped teeth and dog involved did not hold or that they did not hold because they were unseaworthy.

If all this were not enough, there is the additional problem of the degree to which plaintiff's evidence is to be accepted. Most of his case rested on his own testimony, while the defendant put in no evidence at all on the issue of how the accident happened. In passing on a motion for directed verdict all evidence and inferences most favorable to the party against whom the motion is made must be indulged. Always when the motion is made by the proponent there is a problem of the credibility to be attached to his evidence, for if it is disbelieved in important degree his motion must fail.[7] And yet there must be some reason other than caprice for disregarding the proponent's evidence to any significant extent.[8]

Here adequate reason for leaving questions of credibility to the jury lay in the facts that the chief witness had an obvious interest in the case, that the testimony as to how the accident occurred was not very explicit, and that a considerable measure of improbability prevented the conclusion that the dog simply had slipped out of the gear. We conclude, therefore, that the trial judge correctly refused to direct a verdict for the plaintiff.

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7 For a discussion of the problems in directing a verdict on uncontradicted but interested testimony see annotations at 72 A.L.R. 27 and 62 A.L.R. 2d 1191.

8 Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209 (1931).

Plaintiff's appeal from the denial of his motion for a new trial presents the question of whether the weight of the evidence was clearly in his favor.[9] Such a motion is said to be entrusted to the trial judge's discretion because the process of weighing the evidence involves hearing the testimony and seeing the witnesses. Only in very clear cases can the evidence be weighed with enough accuracy by an appellate court to justify it in saying that the trial judge abused his discretion in either granting[10] or refusing[11] the new trial. This is not such a case.

The judgment of the district court will be affirmed.

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9 See Magee v. General Motors Corp., 213 F.2d 899 (3 Cir. 1954).

10. See Zegan v. Central R.R. of N.J., F.2d (3 Cir. 1959).

11 See Grobel v. Miller, 71 F.2d 503, 506 (3 Cir. 1934).

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

May 12, 1959.

ORDER SUR PETITION FOR REHEARING.

Present: McLaughlin and Hastie, *Circuit Judges*, and Morrill, *District Judge*.

After due consideration the petition for rehearing in the above-entitled case is hereby Denied.

By THE COURT:

McLaughlin,
Circuit Judge.

Dated: July 2, 1959.

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 439.

JOHN MIHALCHAK,

Petitioner,

v.

AMERICAN DREDGING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 439.

JOHN MIHALCHAK,

Petitioner.

v.

AMERICAN DREDGING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

COUNTERSTATEMENT OF THE CASE.

The Petitioner, Mihalchak, brought this action under the *Jones Act*, 46 USCA 688, against his employer, American Dredging Company, alleging that an injury sustained by the Petitioner on May 22, 1956 was due to either negligence of the employer or unseaworthiness of the unmanned barge upon which he was injured.

Mihalchak was an experienced hand in this sort of work. He had held similar jobs for a period of about two years with other companies, plus about seven months that he had performed this same work for the Respondent (7b, 1b).[1]

1. In making reference to the record, we will use the suffix (a) to designate the Appendix for the Petitioner in the Court below and the letter (b) for the Appendix for the Respondent in the Court below.

On the evening of the accident which is here in question, Mihalchak had been on board a tugboat which was *not* owned or operated by the Respondent. The tug was utilized to provide motive power for barges or scows which were hauling mud from the place where the Respondent was conducting dredging operations to a dumping ground. The one-way trip was approximately 8 to 10 miles. While in transit, Petitioner rode the tug.

The scow in question (pictured 34a) had five separate pockets into which the dredged material was deposited. The unloading operation consisted of opening doors in the bottom of each of these pockets so that the dredged material simply sank to the bottom of the dumping area.

Anyone who has ever lifted a spade-full of mud is in a position to draw the inference that the weight of the contents in each of the five pockets of the scow was considerable.

The door on the bottom of each pocket was opened and closed by means of a chain. We accept the description of the mechanical arrangement as outlined in the Opinion of the Court below (page 18 of the Petition). What the Court below has referred to as a "dog" is nothing more nor less than a ratchet and pawl arrangement familiar to anyone who has ever tightened a tennis net. On this scow the pawl or "dog" was pivoted at its lower end so as to move in a horizontal plane as opposed to the vertical plane which is more customary on the ratchet and pawl used on a tennis net.

On the night that the cause of action in this case arose, when the flotilla arrived at the dumping site, Mihalchak left the tug and went on board the loaded scow. He was the only person on the scow and, in this connection, it is worthwhile to note that the crew of the tug were not employees of this Respondent. When he went on board the scow Mihalchak had in his hand the heavy maul or sledge which it was intended should be used to strike the pawl so as to dislodge it from the teeth of the ratchet and thereby

permit the tremendous weight of the wet mud to force open the doors composing the bottom of the pocket of the scow and thus empty it.

Once aboard the scow, Mihalchak used his sledge in the usual and expected way to strike the pawl and open the first pocket. He moved to the second one. He testified that he had his hand in the space on one side of the pawl, removing mud and debris when the pawl *spontaneously* moved sidewise out of the teeth of the ratchet thus permitting the door to open.

While it is true that the Respondent placed no witness upon the stand who testified as to the manner in which the accident happened, that is not quite a full and complete account. The Respondent argued to the jury that the uncontroverted facts as established by the testimony introduced by the Petitioner, plus the plain and clear inferences to be drawn from photographs introduced into evidence by the Petitioner, which photographs were taken on two distinct occasions, logically compelled the jury to conclude that the Petitioner's injury was due neither to negligence of the Respondent nor unseaworthiness of its scow. Rather, the argument made to the jury was that Mihalchak brought about his own injury by striking the pawl at a time while his other hand was in the space into which the blows he was delivering were intended to drive the pawl and that, consequently, he had caused his own injury. That was the argument which the jury must necessarily have accepted because it returned a verdict in favor of the Respondent.

There is no question presented here concerning the propriety of the Charge of the Trial Judge to the jury. No exception was taken to that Charge and the issue submitted, particularly the contention of the defense, is clearly set forth in the first full paragraph on page 40b of the Appendix of the Respondent in the Court below.

ARGUMENT.

Point I.

There Is No Important Question of Law in the Present Case Unless This Court Is Prepared to Re-Examine the Line of Cases Commencing With Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500.

During the 1956, 1957 and 1958 Terms of this Court a host of cases were decided, based upon the philosophy expressed in this Court's decisions in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521 and the other cases in the group decided February 25, 1957. Since that date this Court, on several occasions, has reinstated the verdicts of juries which had found in favor of a plaintiff under the F. E. L. A., and or the Jones Act, stating:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

Moore v. Terminal Railroad Association, 79 S. Ct. 2; *Gibson v. Thompson*, 355 U. S. 18.

In both of these decisions the Rogers line of decisions has been cited in support of the action taken by the Court. We assume that in so holding the Court was not promulgating a unilateral rule and that, where the jury concluded that employer negligence (or unseaworthiness) did *not* play a part in producing the Petitioner's injury, this Court will not tolerate judicial intervention with that jury finding. If, in fact, Congress in passing the *Federal Employers' Liability Act*, 45 USCA 51, and the *Jones Act*, 46 USCA 688, intended to require abdication of the judicial function where the jury had found a verdict in favor of the plaintiff, it seems to follow logically that the abdication which the Acts of Congress required was not intended to be

unilateral so as to apply only where the jury's verdict had been returned in favor of the original plaintiff, but that logic requires the same end result where the verdict of the jury has been a finding of the *absence* of negligence (and unseaworthiness) on the part of the employer.

As we see the present case, it is a fit subject for the grant of certiorari by this Court only under two possible conditions. One is if this Court is prepared to rewrite the rule it laid down in *Rogers v. Missouri Pacific, supra*, to provide that the proofs justify with reason the jury's conclusion only where there is a finding in favor of the plaintiff, or if this Court is prepared to re-examine the *Rogers* case and those which have followed it. In the latter event we would join in the Petitioner's prayer that the Writ be granted.

Point II.

There Was Ample Evidence to Justify the Conclusion Which the Jury Reached.

The Petitioner does not attack the holding of the Court of Appeals that in this Jones Act suit the Petitioner has the burden of production and of persuasion. The Petitioner affirmatively argues for what would necessarily be a revision of the rule of *Rogers*. He makes this attack on the holdings of both Courts below, in spite of the following facts:

1. The credibility of the Petitioner was attacked upon a number of Points. Some went directly to the core of the question of liability (21a, 4b, 5b, 19b, 20b, 31b, 32b) and the veracity of Petitioner and his witness. Other questions were raised as to the veracity of Petitioner's testimony upon the question of disability, its duration and degree (12b, 13b, 14b, 15b, 16b, 26b, 27b, 29b, 30b). No direct testimony other than the Petitioner's was possible because no one else was on

the scow and there was no witness to the accident except Petitioner.

2. The Petitioner was an interested witness.

3. The Petitioner had the burden of proof.

4. The Petitioner's version of how the accident occurred was inherently incredible and contrary to physical laws and common experience.

5. Evidence in the form of photographs which the Petitioner himself introduced clearly demonstrated the converse of the Petitioner's assertion that the equipment in question was unfit for the purpose for which it was intended (unseaworthy).

We start with the fundamental proposition that the question of whether a witness is to be believed or not is ordinarily one of fact for decision by the jury. The general rule is that a jury question as to credibility is presented by oral testimony which, although not directly contradictory, contains inherent probability or there has been reflection upon the veracity of the witness at other points in his testimony. *Elzig v. Gudeangen*, 91 F. 2d 434, and cases there cited; see cases collected 62 A. L. R. 2d 1191 et seq.

Since that was true in the case at bar compare 6b, 7b with 12b, 14b, 15b, 16b, 17b. There was an issue for the jury to resolve as to the credibility of this Petitioner. The cases upon which the Petitioner relies such as *San Francisco Association for the Blind v. Industrial Aid for the Blind, Inc.*, 152 F. 2d 532, and *Dietz v. The Greyhound Corporation*, 234 F. 2d 327; *Nicholas v. Davis*, 204 F. 2d 200, are neither controlling nor persuasive. The inferences which a jury may draw are outlined at length by the late Chief Justice Vanderbilt speaking for the Supreme Court of New Jersey in *Ferdinand v. Agricultural Insurance Company*, 126 A. 2d 323. So long as different inferences may reasonably be drawn the verdict of the jury may not be set aside.

The Petitioner here was an interested witness. The reliance which he places upon this Court's decision in *Chesapeake and Ohio R. Co. v. Martin*, 283 U. S. 209, is mistaken. The witness whose testimony was under discussion in the *Martin* case did not have such an interest in the outcome of the litigation as would make applicable the rule stated by this Court in *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401 and *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620. In the *Sonnentheil* case this Court said that the mere fact of interest on the part of the witness in the outcome of the proceeding is sufficient to require determination by the jury. In the *Sartor* case judgment had been granted in the Court below in a summary judgment proceeding based upon affidavits, but this Court reversed, saying:

> "The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury on a question of fact". 321 U. S. 620 at 628.

This is the usual rule applicable in most, if not all, Courts. It is the Pennsylvania rule. In *Second National Bank of Pittsburg v. Hoffman*, 229 Pa. 429, the Supreme Court of Pennsylvania said:

> "If he was interested, his credibility under none of our cases could have been taken from the jury".

What has been said is made doubly apt by the fact that in the case at bar the person whose testimony is being discussed was the party upon whom the law imposed the burden of proof. *Slocum v. New York Life Insurance Company*, 228 U. S. 364. The rule of the *Slocum* decision has been reiterated in a host of later cases.

As part of his case, the Petitioner introduced two separate sets of photographs. The first set was taken without the knowledge of the Respondent only a few weeks following

the injury. The second set was taken shortly prior to trial and long after suit had been instituted. The Petitioner and his witness said that the ratchet and pawl arrangement shown upon both sets of pictures was the same ratchet and pawl which had been involved in the accident. The pictures were their own demonstration of the fact that the equipment had not been changed, altered or repaired in the interim. On both occasions the testimony showed the mechanism was performing its intended function, the pawl prevented the ratchet from turning and it in turn was holding the chain which supported the bottom of the scow. It was surely reasonable for the jury to draw the inference that steel chain does not stretch. If that be so, then the pawl was inserted in the portion of the ratchet shown in the photographs. Those photographs showed that one edge of the pawl was flared from repeated blows of the sledge, in a manner somewhat similar to the way the head of a steel chisel becomes flared with use. It is obvious that no amount of flaring of the head of a chisel prevents the *other end* from performing its intended function. So in our case, the end of the pawl intended to hold the ratchet was performing its intended function in the photographs the Petitioner himself introduced into evidence. It was just as obvious that the equipment was neither new nor recently repaired. The Petitioner nevertheless now argues that the jury was not free to conclude that the most likely explanation for the accident was that the Petitioner himself had caused it, and that he had been less than completely candid in his testimony in which he denied that he struck the pawl with his sledge just prior to the accident. The demonstration which the photographs gave of proper and successful operation all during the intervening time, from the date of the accident to the date the second set of photographs was taken, was indicative of the fitness of the equipment for its purpose and the jury was certainly entitled to reach *its own conclusions* based upon this record.

What the Petitioner really asks this Court to hold is that a Trial Court must nevertheless direct the verdict in favor of the party upon whom rests the burden of proof and the burden of persuasion simply because there may be oral testimony as to the existence of something which, on the basis of physical facts demonstrated in the record, is either impossible or inherently improbable.

The Petitioner makes an argument which, in the setting of this case, is hardly pertinent. This statement is directed to that portion of the Petitioner's argument (Petition p. 10) wherein it is stated that the equipment involved was in the possession of the Respondent. From this it is argued that the election of the Respondent to dispense with oral testimony, concerning points already photographically demonstrated by exhibits introduced by the Petitioner, called for the direction of a verdict for Petitioner. The Petitioner was entitled to ask the Trial Judge to instruct the jury on this point if he had then deemed it appropriate. No such instruction was requested and no complaint is here made concerning the Charge of the Trial Judge to the jury. Since no instruction on the point was requested, the Petitioner is not now entitled to complain. F. R. C. P. 51.

Point III.

This Court's Decision in Crumady v. Joachim Hendrick Fisser, 358 U. S. 423 and the Other Cases Cited in Point II of the Petition Are Not Even Remotely Involved in the Present Case.

In the Petitioner's Point II, he seizes upon language taken out of context from the decision of the Court below and attempts to premise an argument which is patently incorrect.

The Court of Appeals was discussing testimony (Petition p. 20) "of instances on some of the other scows operated by the same company where similarly chipped teeth and dogs had actually slipped". The Opinion of the Court

below then went on to point out that the testimony in this case, pertaining *to those other instances*, did not foreclose the possibility that *in those other instances* of slipping of the pawl *on other scows* there was the possibility that such slipping "was occasioned by original improper securing of the dog". That, we suggest, is a far cry from arguing that the Court of Appeals founded its decision, affirming the District Court, upon the proposition that the dog or pawl in this case slipped from the gear because it had been improperly secured originally.

The Petitioner's argument lacks logic on other grounds if it is applied to the facts of this case. Here the pawl or dog had been inserted well enough to support the tremendous weight of the contents of the pocket all during the time the mud was being deposited in it, plus the time that it took to transport the scow 8 or 10 miles from the dredging site to the dumping site where the accident occurred. We concede improper insertion might be a permissible inference for the finder of facts to draw from the evidence, but surely it was not a compulsory inference such as to make the conclusion one of law for the Court rather than for jury determination.

CONCLUSION.

No important point of law is involved in this case. The Petitioner neither cites nor claims conflict between Circuits and the decision of the Court below is clearly consonant with the rules of decision of this Court. There is nothing in the case which merits the grant of certiorari.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
Counsel for Respondent.